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IN THE

Supreme Court of the United States

October Term, 1950.

No. 301.

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT,

Petitioner,

vs.

SOUTHERN CALIFORNIA GAS COMPANY, a corporation, and SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA, a corporation,

Respondents.

On Petition for a Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District, Division One.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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IN THE

Supreme Court of the United States

October Term, 1959.

No. 281

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT,

Petitioner,

vs.

SOUTHERN CALIFORNIA GAS COMPANY, a corporation, and SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA, a corporation,

Respondents.

On Petition for Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District, Division One.

BRIEF FOR RESPONDENTS IN OPPOSITION.

Respondents, Southern California Gas Company and Southern Counties Gas Company of California respectfully request this Honorable Court to deny the petition of Los Angeles County Flood Control District for a Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District, Division One, to review its judgment, Civ. No. 23356, April 24, 1959, which affirmed the decision of the Superior Court in *Southern California Gas Company, et al. v. Los Angeles County Flood Control District*, Los Angeles Superior Court Case No. 659-797.

Opinions Below.

The memorandum of opinion of the Superior Court which granted judgment to the respondents is unreported, but is printed as Appendix A of this brief. The opinion of the District Court of Appeal which affirmed unanimously the judgment of the Superior Court has not yet been published, but will be reported in 169 California Appellate Reports 2nd, and is now reported in 69 Advance California Appellate Reports, page 881, etc. and 338 Pacific 2nd, page 29, etc., and is printed as Appendix B of this brief.

The Flood Control District petitioned the District Court for a rehearing, but the petition was denied on May 20, 1959. The Flood Control District then petitioned the Supreme Court of the State of California for a hearing, and that petition was denied on June 18, 1959.

Jurisdiction.

The petitioner has not set forth the jurisdictional requisites necessary to invoke the jurisdiction of this Court. Although certain statutory provisions contained in 28 U. S. Code and Rule 19 of the Rules of this Court were cited in the petition, the petitioner failed to explain the applicability of those provisions to the opinions of the courts below so as to show that a "federal question of substance" was decided. On the contrary, it is clear from these opinions that the state courts' judgments were based on a non-federal ground and that the non-federal ground was adequate to support the judgments therein.

Question Presented.

Whether a public utility can be required to relocate at its own expense an underground pipeline installed within a private easement obtained from the fee simple owner to make way for the widening and deepening of a small drainage ditch by a flood control district.

State Constitutional Provisions Involved.

Section 14 of Article I of the California Constitution.

Statement.

Respondents are the owners of a gas pipeline thirty (30) inches in diameter which was constructed in 1947 in the land owned by Pacific Electric Railway Company, owners of the fee land [Clk. Tr. p. 23], under and across the bed of a so-called natural watercourse in Los Angeles County, California. Pacific Electric Railway Company had granted the right to respondents to construct such line under an agreement dated August 31, 1946 for a period of twenty (20) years and sometimes referred to as "an underground pipe or ditch crossing agreement or lease" [Clk. Tr. pp. 20 and 21]. Petitioner has filed with this Court only one exhibit; but several of the other exhibits referred to in the Clerk's Transcript are photographs showing the natural watercourse to be a dried-up brook. [These are exhibits referred to on p. 31 of Clk. Tr.]

In 1954, the petitioner advised the Gas Companies that it planned to widen and deepen a certain drainage ditch pursuant to "East Whittier Storm Drain Project No. 29,"

and requested the Gas Companies to relocate their pipeline at their own expense "under the terms of its permit or franchise." The Gas Companies advised the petitioner that the pipeline was within their own private easement. Then the petitioner, by letter dated March 11, 1955, advised the Gas Companies that, although the pipeline was situated in a private easement, "it crosses a natural drain along which this project will be constructed," and that in the case of natural drains such as this the public enjoys a natural easement which by its nature would predate any private easement," and that consequently the burden of bearing the cost of relocating the pipeline was upon the owner of the private easement.

On May 24, 1955, an agreement for "Easement for Storm Drain" was executed by the Pacific Electric Railway Company, the owner of the fee, and the petitioner, pursuant to authorization by the Board of Supervisors of the County of Los Angeles, "subject to all valid existing contracts, leases, liens, or encumbrances which may affect the property and the word 'grant' as used herein shall not be construed as a covenant against the existence of any thereof." The petitioner, as consideration for said easement, promised to reimburse the Railway for any and all costs and expenses incurred in connection with changes required because of the construction of the said storm drain.

It should be noted that the pipeline did not interfere with the flow of water in the drainage ditch, but that the proposed enclosed underground storm drain which

lowered the bed of the ditch several feet would have bisected the pipeline.

The petitioner at no time filed any proceedings in condemnation to obtain title to or to take possession of any interest in the land or physical property owned by Pacific Electric Railway Company or of the respondents or other property in or adjacent to the property described in Exhibit 8.

The petitioner and the Gas Companies entered into a *status quo* agreement dated May 1, 1955, which recited that "the installation by the District of the Storm Drain . . . will necessarily conflict with an existing 30-inch pipeline . . .", and that a controversy exists between them as to which should bear the cost of relocation of said pipeline. Pursuant to said *status quo* agreement, the Gas Companies relocated their pipeline at a cost to them of $6,660.98.

A suit was brought in the Superior Court of the County of Los Angeles against the petitioner, for damages on the basis that there was a taking, damaging and appropriation of respondents' property without payment of just compensation. Respondents recovered judgment as prayed for and the judgment was affirmed by the District Court of Appeal.

ARGUMENT.

I.

The Appellant Has Failed to Set Forth Jurisdictional Requisites Necessary to Invoke the Jurisdiction of the United States Supreme Court.

1. General Rule.

The Supreme Court has consistently held that it will not grant certiorari to review a state court's judgment based upon an adequate and independent non-federal ground which made consideration of an asserted federal question unnecessary.

The general rule was laid down by Justice Story in *Crowell v. Randell*, 10 Pet. (U. S.) 368, 9 L. Ed. 458 (1836), wherein he stated that in order to justify the United States Supreme Court in taking jurisdiction to review the decision of a state court it must appear that one of the questions stated in the 25th Section of the Judiciary Act must have arisen, that the question was decided by the state court, that the question by necessity must have been raised and must have been decided to induce judgment and it would not be sufficient to show that the question might have arisen or might have been applicable.

To this general rule has been added that there must be a real and substantial federal question.

New Orleans v. New Orleans Waterworks Co., 142 U. S. 79, 35 L. Ed. 943, 12 S. Ct. 142 (1891);

Consolidated Turnp. Co. v. Norfolk & O. V. R. Co., 228 U. S. 596, 5 L. Ed. 982, 33 S. Ct. 605 (1913);

Southwestern Bell Telephone Company v. State of Oklahoma, 303 U. S. 206, 82 L. Ed. 751, 58 S. Ct. 528 (1938).

The reiteration of this rule by the Supreme Court is found throughout its decisions. In *Minnesota v. National Tea Co.*, 309 U. S. 551, 84 L. Ed. 920 (1939) the Court stated on page 557:

> "It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions."

Chief Justice Hughes in the *National Tea Company* case, *supra,* in the dissenting opinion, stated on Page 558:

> "The decision thus rested upon an adequate non-federal ground and in accordance with long-established doctrine we are without jurisdiction."
>
> "Fox Film Corp. v. Muller, 296 U. S. 207, 210 80 L. Ed. 158, 195, 56 S. Ct. 183."

In *Herb v. Pitcairn,* 324 U. S. 117, 89 L. Ed. 789 (1944), on pages 125 and 126, the Court states:

> "The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and Federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion."

2. No Federal Question Arose.

The petitioner has failed to cite a single federal right that was claimed by it and denied. Nor has the petitioner shown that *any* asserted federal right has suffered or might suffer by reason of the decisions of the courts below. The two reasons on which the petitioner apparently bases its allegation that a federal question arose are (1) the *respondents'* briefs alleged that the taking of a private easement without the payment of just compensation would violate the California Constitution and the Constitution of the United States, and (2) that Section 13 of Article I of the California Constitution (which was not mentioned either in the respondents' briefs or by the courts) was similar in language and meaning to the Fourteenth Amendment of the Constitution of the United States. Both of these reasons beg the question.

It has been held that before the Supreme Court has jurisdiction to re-examine the final judgment of a state court, the averments must be clear and positive so as to place it beyond question *that the party bringing the case up for review* intended to assert a federal right.

F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 41 L. Ed. 1149, 175 S. Ct. 709 (1897);

Levy v. Superior Ct., 167 U. S. 175, 42 L. Ed. 126, 17 S. Ct. 769 (1897);

Kipley v. Illinois, 170 U. S. 182, 42 L. Ed. 998, 18 S. Ct. 550 (1898).

F. G. Oxley Stave Co. v. Butler County, *supra*, quotes *Proprietors of Bridges v. Hoboken Land and Improvement Co.*, 68 U. S. 571, 1 Wall. 116, 140 (17:571), as follows:

". . . the court must be able to see clearly, from the whole record, that a certain provision of the Con-

stitution or act of Congress was relied on *by the party who brings the writ of error*, and that the right thus claimed *by him* was denied." (Emphasis added.)

To the same effect see:

Tyler v. Judges of Court of Registration, 179 U. S. 405, 45 L. Ed. 252, 21 S. Ct. 206 (1900).

Even if the state courts had based their decisions upon a state constitutional provision similar to one in the Constitution of the United States, as asserted by the petitioner, it does not necessarily follow that the state court would be, as a matter of course, basing its decision upon a federal question. In *New York v. Central Savings Bank*, 306 U. S. 661, 83 L. Ed. 1058, 59 S. Ct. 790 (1939), the Supreme Court had been requested to issue a Writ of Certiorari to the Court of Appeals of New York which had decided that a state statute was repugnant to the due process clause of the state constitution, that clause being the same as the due process clause of the Fourteenth Amendment which the court held also had been violated. 280 N. Y. 9, 10, 19 N. E. 2d 659, 121 A. L. R. 615 (1939).

The Supreme Court of the United States in its denial of the writ stated as follows:

"Denied for the reason that the judgment sought to be reviewed rests upon a non-federal ground adequate to support it.

Lynch v. New York 293 U. S. 52, 79 L. Ed. 191, 55 S. Ct. 16

Honeyman v. Hana 300 U. S. 14, 18, 19, 81 L. Ed. 476, 479, 57 S. Ct. 350."

3. A Federal Question Was Not Decided.

Even if it were to be assumed that a federal question did arise in the lower courts, the petitioner has failed to show that the courts passed upon or decided such a question. There is nothing in the record to show that the District Court of Appeal relied on or even made reference to the Constitution of the United States.

It is settled that in order to justify the United States Supreme Court in reviewing the judgment or decree of a state court, the record must show that the judgment rested upon the disposition of a federal question.

Marsh v. Nichols, S. & Co., 140 U. S. 344, 35 L. Ed. 413, 11 S. Ct. 798 (1891).

It is necessary not only that some one of the questions mentioned in the statute should exist on the record but also that the decision thereof should be controlling in the disposition of the cause.

Citizens' Bank v. Board of Liquidation, 98 U. S. 140, 25 L. Ed. 114 (1879).

Jurisdiction cannot be founded upon a mere surmise that the decision of the state court turned upon a federal question.

Lynch v. New York, 293 U. S. 592, 79 L. Ed. 191, 55 S. Ct. 16 (1934);

Adams v. Russell, 229 U. S. 353, 57 L. Ed. 1224, 33 S. Ct. 846 (1913).

It must, therefore, appear from the record, affirmatively or by fair implication, that the decision of the federal question was necessary to the determination of the case.

An analysis of the decisions of the courts below shows clearly that the statutory provisions in 28 United States Code and Rule 19 of the Rules of this Court do not contain grounds under the facts of this case which would confer jurisdiction on the Supreme Court to review the judgment by a Writ of Certiorari. Section 1257, paragraph 3 of 28 United States Code, cited by the appellant, states that final judgments rendered by the highest court of the state may be reviewed "where the validity of a state statute is drawn in question on the ground of its being repugnant to the constitution" or "where any title, right, privilege or immunity is specially set up or claimed under the constitution." We submit that the petitioner has not shown that these provisions are in any way applicable to the decisions which it desires be reviewed.

4. Decisions of the State Courts Are Based on Adequate Non-Federal Grounds.

The petition of the Flood Control District ignores the language of the District Court of Appeal which shows that the decision was based upon the California Constitution. The District Court quotes from *Bauer v. County of Ventura*, 45 Cal. 2d 276, 289 P. 2d 1 (1955), at pages 282 and 284, as follows:

> *"California Constitution, article I, section 14, provides*: 'Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court, for, the owner. . . .'
>
> ". . . Hence it is clear that the ordinary taking of private property for the purpose of constructing storm drainage systems is a taking for a public use. The reasons for such a taking are obviously to provide adequate normal drainage, to control flood

waters and to provide irrigation waters. The public becomes principally entitled to the use and enjoyment of the private property taken for such purposes." (p. 284.)

". . . . It follows that the taking or damaging of private property for the maintenance of an existing public improvement involving a deliberate act which has as its object the direct or indirect accomplishment of the purpose of the improvement as a whole constitutes a taking or damaging of property for a public use and the owner of such property is entitled to compensation." (Emphasis added.)

In another portion of its decision the District Court sets out the law in California as to non-navigable streams as follows:

"Generally speaking, the bed of navigable rivers and streams belongs to the state. . . . If a stream or watercourse is not navigable, the bed is the private property of the riparian owners, and may not be taken for public use without compensation. . . ." (25 Cal. Jur. 1046-1048; *Freeman v. Bellegarde*, 108 Cal. 179, 185 [41 P. 289, 49 Am. St. Rep. 76]; and *People v. Elk River M. & L. Co.*, 107 Cal. 221, 224 [40 P. 531, 48 Am. St. Rep. 125].)

Even if the lower courts had based their decisions on both federal and non-federal grounds, this Honorable Court has held that if will not inquire into a judgment if there are adequate state grounds.

Fox Film Corp. v. Muller, supra;

Enterprise Irrig. Dist. v. Farmer's Mut. Canal Co., 243 U. S. 157, 163-164, 61 L. Ed. 645 (1917).

In *Minnesota v. National Tea Company, supra,* at page 556, the Court stated:

> "It is possible that the state court employed the decisions under the federal constitution merely as persuasive authorities for its independent interpretation of the state constitution."

In *Hammerstein v. Superior Court of California,* 340 U. S. 622, 95 L. Ed. 587 (1950), both federal and non-federal questions were involved. The Supreme Court refused to hear the case until the California Courts expressed an opinion as to, "whether the decision of the federal question was *necessary* to the judgment rendered." The Supreme Court stated on page 623:

> "If their judgments rest upon an adequate state ground, we, of course, will not review those judgments."

II.

The Decisions of the Courts Below Are Clearly Correct.

The decision of the District Court of Appeal makes it clear that it is well settled in California that the taking of a private easement without just compensation is in violation of Section 14, Article I of the California Constitution. There is ample California authority to support this conclusion. The petitioner has failed to cite a single California case to the contrary, but has instead advanced a "natural watercourse" theory in an effort to sustain its position. To the effect that the taking of private property for the construction of a storm drain is a taking for pub-

lic use and that just compensation must be paid to the owner, respondents have cited:

Bauer v. County of Ventura, 45 Cal. 2d 276, (1955);

Podesta v. Linden Irr. Dist., 141 Cal. App. 2d 38, (1956).

Other California cases have specifically held that, where pipeline facilities are located in a private easement and are ordered to be relocated in connection with an improvement by a governmental body, the owner of the facilities must be compensated. In the case of *County of Los Angeles v. Wright* (1951), 107 Cal. App. 2d 235, the defendant was the owner in fee of a pipeline right of way granted to it by the owner of the fee. At a later date a road easement was granted to the County of Los Angeles by the owner of the fee. The County demanded the relocation of the pipeline facilities installed within the easement. The court stated on page 241:

> "An easement over land is real property and the owner of such easement is entitled to recover damages when such easement is taken or damaged for public use. Pacific is therefore entitled to damages in the amount of the cost of removal of its pipe line. . . ."

Decisions in the highest courts of sister states, under factual situations almost identical with the one before the California courts, have held that a drainage district must reimburse a gas company for the relocation of facilities installed within a private easement.

In *Petition of Dreosch et al., Northern Natural Gas Co. v. Blue Earth County*, 47 N. W. 2d 106 (1951), the

Supreme Court of the State of Minnesota was concerned with the following situation. The Northern Natural Gas Company, a private corporation, operated a natural gas pipeline system which delivered gas from Kansas and Texas to several states including Minnesota. Its pipelines were primarily installed in private rights of way purchased from record owners.

County Ditch No. 78 was established for draining 10,000 acres of agricultural land. It followed a natural swale which crossed the pipeline of the gas company in three places. At each of these points the pipeline was installed within private easements and had been placed below the surface of the drainage ditch. The improvement of the ditch involved the enlargement and deepening of a natural watercourse and necessitated either the lowering or raising of the pipeline. It was argued, as it has been in this case, that the improvement was for the promotion of public welfare, that there was a natural right to drain the upper land, that the gas company had knowledge of the watercourse and that there was an injury *damnum absque injuria* because the establishment of a drainage system is in the exercise of police power.

On page 109, the Court quoted from *In re Town Ditch No. 1*, 208 Minn. 566, 571, 295 N. W. 47, 49 (1940):

> ". . . . Their damage, if any, will result from the exercise of power of eminent domain. So it is immaterial that, from the standpoint of public health, the police power justifies the drainage. The property is taken or damaged, not by the police power, but by that of eminent domain. Hence, the right to compensation is absolute."

On page 110 the Court stated as follows:

"An easement is *property* and when taken for public use the owner is ordinarily entitled to compensation."

In *Cities Service Gas Co. v. Riverside Drainage District*, 137 Kan. 410, 20 P. 2d 520 (1933), the gas company owned land through which ran a small natural watercourse and across which the company had installed a gas transmission pipeline. The widening and deepening of the watercourse by the drainage district necessitated the relocation of the pipeline. The Supreme Court of Kansas held that the gas company was entitled to recover for the land appropriated and for the reasonable cost of relocating its pipeline. On pages 521 and 522 the court stated:

"It was a nonnavigable stream, and the plaintiff owned the banks and beds of the creek and the rights to use them subject of course to the rights of riparian owners in the flow of the water.

"The pipe line of the plaintiff was an improvement of a permanent nature, was originally placed twelve inches below the bed of the stream across which it was laid, and it could not be regarded as an obstruction when it was placed there. The plaintiff was as much entitled to damages for the removal and replacement of the pipe line as if it had been a substantial building on the bank of the watercourse which required removal before the widening and deepening process was begun by the drainage district, and it would hardly be contended that the owner of the building in such a case would not be entitled to compensation."

The court rejected the contention that the taking was an exercise of the police power by stating (p. 522):

> "The rule applies in some emergencies, such as the destruction of property to avert impending peril, as to prevent the spread of fire, the washing out of a highway during a freshlet or flood, and the abatement of a nuisance. There are cases too where *franchises* have been granted . . . to place pipes in public streets . . . and which they can be required to move without compensation. . . . *Property cannot be appropriated without compensation under the guise of police power.* . . . In an ordinary case of condemnation and appropriation of the owner's property as in the present case, the constitutional right to compensation cannot be ignored or denied." (Emphasis supplied.)

III.

There Is No Conflict of Decisions.

Petitioner, having been defeated in the California Courts, and being unable to cite any California decision in its favor seeks to secure a hearing before this court on the basis of a federal case. It places its reliance upon the case of *Chicago, Burlington & Quincy Railway Company v. People of the State of Illinois*, 200 U. S. 561, 50 L. Ed. 596, 26 S. Ct. 341 (1906).

The facts of this railroad case, as well as the other railroad cases cited by the petitioner in the courts below, are clearly not analogous to the relocation of a pipeline installed in a private easement under a drainage ditch. In every instance the railroad companies had assumed the duty to relocate by reason of the terms of the franchises, charters or statutory authority under which they

were authorized to operate and none involved the ownership of the fee or a private easement. This is clearly indicated in the *Chicago, B. & Q.* case where the Supreme Court of Illinois, 72 N. E. 219, said at page 222:

> "While its charter is not set out in the petition, and its exact provisions are not before us, the presumption will be that its charter is such as is ordinarily granted to construct and operate a railroad between the points therein mentioned. The allegation of the petition is that appellant was organized 'with corporate power to build, construct, operate and maintain a railroad at and in the township and county aforesaid,' and there is no presumption that it had any greater powers than those set forth in the petition. As said in *Ligare v. City of Chicago*, 139 Ill. 46, 28 N. E. 934, 32 Am. St. Rep. 179: 'When a *franchise* is granted to construct ways or streets across a waterway there is no implied right to destroy the waterway, but it must be so bridged that its use will not be unnecessarily impaired." (Emphasis supplied.)

In *Chicago, B. & Q. R. Co. v. Illinois, supra*, the United States Supreme Court in affirming the *Chicago* case, states on page 566:

> "The railway company operated and maintained its road across Rob Roy Creek not under any specific grant of authority, but under its general corporate power to construct, operate and maintain a railroad."

The Supreme Court has also specifically limited the rule in the *Chicago, B. & Q.* case to railroads. In *Panhandle, etc. v. State Highway Commission*, 294 U. S. 614, 55 S. Ct. 563, 79 L. Ed. 1090 (1935), which involved

the relocation of a pipeline installed within a private right of way, the Court on page 622, stated:

> "The rule in respect of railroad crossings applies when there is substantial risk of injury to the public from the operation of trains, and ground to imply the company's consent to take such measures as may be necessary to prevent the hazard. This Court has not sanctioned extension of the rule to wholly dissimilar circumstances; it does not apply to structures which are unattended by serious danger to the public.
>
> The police power of a state, while not susceptible of definition with circumstantial precision, must be exercised within a limited ambit and is subordinate to constitutional limitations. It springs from the obligation of the state to protect its citizens and provide for the safety and good order of society. Under it there is no unrestricted authority to accomplish whatever the public may presently desire. It is the governmental power of self-protection and permits reasonable regulation of rights and property in particulars essential to the preservation of the community from injury.
>
> *New York & N. E. R. Co. v. Bristol,* 151 U. S. 556, 38 L. Ed. 269, 14 S. Ct. 437."

The argument that the *Chicago, B. & Q.* case is applicable in the case before the Court is also irreconcilable with the agreement between the petitioner and the Pacific Electric Railway under which the petitioner agreed to pay all relocation damages sustained by the railroad. If the *Chicago, B. & Q.* case did not furnish a basis for the Flood Control District to compel the railroad to re-

locate at its own expense, how can such a principle be applied against the respondent, who constructed a pipeline within a private easement across the railroad private property.

A further important distinction between the case before this Court and the *Chicago, B. & Q.* case is that the petitioner in the railroad case claimed that *its* private property was being taken without just compensation and that *its* federal right was being violated. No such allegation has been made by the petitioner in this case. At no time has any claim been made that the peittioner's title, rights, privilege or immunity claimed under the constitution have been assailed or violated.

IV.

There Is No Important Question of Federal Law.

The question as to whether there is a natural easement running to the public for flood control purposes across private property so as to subordinate the interest of the owner of that property and his right to maintain improvements thereon, which would permit the public to dispossess the land owner or the facilities without just compensation was flatly answered by the District Court as follows:

> "We are satisfied that there is no 'natural easement' across private property along a ditch or drainway in favor of the Flood Control District or other governmental authority for the purpose of constructing public works."

The respondents maintained their pipeline within a private easement and it is well settled that an easement is private property and therefore cannot be taken without just compensation.

It borders on the extreme for the petitioner to recite the general flood conditions in the County of Los Angeles in a way which implies that the whole flood control program of the Flood Control District is in jeopardy unless the District is given a completely free hand.

We therefore submit that there is no violation of any constitutional provision involved in this case and no conflict with any decision of the Supreme Court of the United States. The matter which the petitioner asks the Court to review is one of local importance and the decisions of the courts below were based upon state law. The respondents believe that there is no important federal question involved, such as urged by the petitioner. The petitioner has attempted to interject statutes which were not reviewed by the lower courts, a new theory of law and a discussion of general flood control problems in California, none of which is pertinent, and do not convert what the respondents believe to be a correct decision in a simple case into an important question of federal law.

For the foregoing reasons, it is respectfully submitted that this petition for Writ of Certiorari be denied.

Respectfully submitted,

T. J. REYNOLDS,

L. T. RICE,

ALLEN L. CLEVELAND,

C. R. SALTER,

Attorneys for Respondents Southern California Gas Company and Southern Counties Gas Company of Califarnia.

APPENDIX A.

Opinion of the Superior Court.

In the Superior Court of the State of California in and for the County of Los Angeles.

Southern California Gas Company, a corporation, and Southern Counties Gas Company of California, a corporation, Plaintiffs, vs. Los Angeles County Flood Control District, a body Corporate and Politic, Defendant. No. 659-797.

MEMORANDUM RULING.

This case presents a question of first impression in this State. The question is whether a public utility may be required by a Flood Control District to remove and relocate at its own cost its underground gas transmission pipe lines along with certain facilities located upon or under land wherein it had acquired an easement from the fee-simple owner. The District did not seek to condemn the property, as it might have done, but on the contrary proceeded on the theory that as the pipe line and its facilities were located within the boundaries of a natural watercourse it could deepen, widen and extend the channel for the benefit of the public, without compensation to the plaintiff utilities. In short and in effect, the District predicates its right on the theory that it is exercising its police power or in any event that it has succeeded to the alleged right of the public to have the watercourse kept open and if necessary enlarged to carry any amount of surface and flood waters channeled by it so as to avoid damage to properties within the district.

The contention appears to overlook the fact that even the State or a municipality may not deepen and widen a natural watercourse so as to throw a greater volume of water on the property of a downstream owner without the payment of due compensation, nor may it widen and deepen the existing drainage ditch without paying compensation to the abutting landowners. A so-called watercourse more accurately described as a drainage ditch which began as a natural route to carry surface and storm waters will quite naturally increase in depth and width as a locality becomes more and more densely populated. But it can hardly be said that the government, through its agencies, may artifically widen and deepen the ditch so as to protect the landowners in a watershed by taking the abutting lands without compensation.

Mr. Justice Holmes in Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 413, 415, 416, said: "As long recognized, some values are enjoyed under an implied limitation and must yield to police power. But obviously the implied limitation must have its limits, or the absolute contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases, there must be an exercise of eminent domain and compensation to sustain the act." So in the instant case it would seem that the police power cannot be stretched by the defendant to the point of requiring the plaintiff to remove and re-establish the facilities upon ground which it had procured and leased from the fee title owner many years ago.

It is of course true, as defendant contends, that there is a ditch which carries off water, and that this ditch has been formed over the years because of the natural drainage of surface and storm waters is of course true. But this does not give to defendant District by virtue of the police power the right to use that power so as to avoid paying compensation. In my view, compensation is due and payable.

For that reason judgment is ordered for the plaintiffs in the amount stipulated as the cost of removal of the structures involved.

Dated August 29, 1957

CLARENCE M. HANSON,

Judge.

APPENDIX B.

Opinion of the District Court of Appeal.

[Civ. No. 23356. Second Dist., Div. One. Apr. 24, 1959.]

Southern California Gas Company (a Corporation) *et al.*, Respondents, v. Los Angeles County Flood Control District, Appellant.

Appeal from a judgment of the Superior Court of Los Angeles County. Clarence M. Hanson, Judge. Affirmed.

Proceeding in inverse condemnation against a flood control district to recover the cost of relocating a gas pipeline. Judgment for plaintiffs affirmed.

Harold W. Kennedy, County Counsel, Baldo M. Kristovich, Assistant County Counsel, Ivar E. Skjeie and Edward H. Gaylord, Deputies County Counsel, for Appellant.

T. J. Reynolds, L. T. Rice, Allen L. Cleveland and C. R. Salter for Respondents.

WHITE, *P. J.*—Southern California Gas Company and Southern Counties Gas Company of California, corporations, hereinafter referred to as the "Gas Companies," brought this action in inverse condemnation against the Los Angeles County Flood Control District, a body corporate and politic, hereinafter referred to as the "District," to recover $6,660.98, the cost of relocating their 30-inch high pressure gas pipe in a 20-year right-of-way easement therefor granted to them by the Pacific Electric Railway, the owner of the fee simple title to the land since 1906. The District appeals from judgment for the Gas Companies.

August 25, 1953, the District entered into an agreement with the county of Los Angeles, in which it is recited that the issuance of its bonds "for the control of surface waters by the construction of storm drains and drainage channels has been authorized," and the county agreed "to proceed with the work of preparing final construction plans and specifications for the construction of those storm drain projects herein described . . .," including East Whittier Storm Drain Project Number 29, out of which the instant action arose, and to complete and deliver to the District said plans and specifications.

A portion of said county engineer's undated specifications describes said Project Number 29 as follows: "The work will extend in an easement, following the natural channel of La Canada Verde Creek, from a point approximately 90 feet southerly of Lambert Road to Second Street."

The District's specifications, its contract for construction, and the contractor's faithful performance bond refer to the project as "Construction of Storm Drain."

In 1954, the District advised the Gas Companies that the District planned to widen and deepen the ditch known as "East Whittier Storm Drain Project No. 29," and requested that their pipeline be relocated at their own expense "under the terms of its permit or franchise." The Gas Companies advised the District that the pipeline was within their own private easement. Then the District, by letter dated March 11, 1955, advised the Gas Companies that, although their pipeline is situated in a private easement, "it crosses a natural drain along which this project will be constructed," and that in the case of "natural drains such as this the public enjoys a natural easement which by its nature would predate any private easement,"

and that consequently the burden of relocating the pipeline was upon the owner of the private easement.

May 24, 1955, pursuant to authorization by the board of supervisors, an agreement for "Easement for Storm Drain" across said land belonging to the Pacific Electric Railway Company was signed and acknowledged by the Railway and the District, "subject to all valid existing contracts, leases, liens, or encumbrances which may affect the property and the word 'grant' as used herein shall not be construed as a covenant against the existence of any thereof." The District, as consideration for said easement, promised to reimburse the Railway for any and all costs and expenses incurred in connection with changes required because of the construction of the said storm drain.

The Gas Companies' "Underground Pipe and Ditch Crossing" agreement with the Railway is dated August 31, 1946, and covers the agreed term of 20 years.

The District and the Gas Companies, under date of May 1, 1955, entered into a *status quo* agreement reciting that "the installation by the District of the Storm Drain . . . will necessarily conflict with an existing 30 inch pipeline . . .," and that a controversy exists between them as to which should bear the cost of relocation of said pipeline. Pursuant to said *status quo* agreement, the Gas Companies relocated their pipeline at a cost to them of $6,660.98.

It appears from the photographic exhibits, maps and drawings of the locale, and was found by the court, that Storm Drain Project Number 29 was designed and constructed to "carry off surface rain water run off from the northern slope of the Puente Hills." It was further found that said Project Number 29 is an artificial im-

provement of a natural watercourse; that, while the stream bed of La Canada Verde Creek is better defined north of Whittier Boulevard than in the vicinity of the Gas Companies' said pipeline, nevertheless, as shown by the United States Geological Survey Maps and other evidence including photographs showing railroad trestles over it and culverts and ditches along its course, the portion of the stream bed being considered on this appeal has long been existent; that although the pipeline of the Gas Companies was well below the ground when installed, the flow of waters in said creek so eroded said channel that before its relocation said pipeline was protruding "above the bed or flow line of La Canada Verde Creek"; and that it was necessary that said pipeline be relocated.

The District's justification of its refusal to pay the costs of the Gas Companies in moving their said pipeline is based primarily upon its claim that every owner of land (or of an easement over land) which is a part of, or immediately adjacent to "a natural watercourse or drainway" owns it subject to "a natural right of the public to utilize such natural facility," to there construct "reasonable artificial improvements for the drainage" of domestic waters and from time to time to deepen and improve such channel for that purpose; and subject to the requirement that any improvements placed by such owner upon said land or easement must from time to time be altered at his own expense as required by public agencies "in aid of the drainage of domestic waters in the drainway"; that the obligation and duty on the part of such owners of land and easements has been enforced as "a part of the retained sovereign or police power of the public exercisable by jurisdictional bodies or agencies, of which appellant is one"; that the public always owned the right to the unrestricted drainway and to enlarge it when and if such

enlargement is needed and all private ownership is subject to that right of the public.

That, if the state, of which appellant is the agent in the instant action, ever owned such an easement, it could not have been lost either by nonuser or by the agreement with the Railway for the "Easement for Storm Drain" hereinbefore described.

Therefore, the first issue to be considered on the instant appeal is the nature of appellant District's rights in the land belonging to Pacific Electric Railway Company and the easement granted by said Railway to the Gas Companies. Is such right, as stated in the grant of the "Easement for Storm Drain," subject to the Railway's prior valid and existing contract with the Gas Companies for "Underground Pipe and Ditch Crossing," or, is it, as urged by appellant, superior even to the rights of all riparian owners—including the Railway?

"Generally speaking, the bed of navigable rivers and streams belongs to the state. . . . If a stream or watercourse is not navigable, the bed is the private property of the riparian owners, and may not be taken for public use without compensation . . ." (25 Cal. Jur. 1046-1048; Freeman v. Bellegarde, 108 Cal. 179, 185 [41 P. 289, 49 Am. St. Rep. 76]; and People v. Elk River M. & L. Co., 107 Cal. 221, 224 [40 P. 531, 48 Am. St. Rep. 125].)

Appellant, in its opening brief, cites the following decisions of the California courts as authority for its statement that "the rule is universal that lands located in or along a watercourse are subject to a natural easement or servitude to receive all water naturally arising within the watershed or drainage area served and all of such waters

may be directed into such watercourse by artificial means . . . ."

In San Gabriel Valley Country Club v. County of Los Angeles, 182 Cal. 392 [188 P. 554, 9 A. L. R. 1200], judgment for plaintiff for damage caused by the erosion of its property was reversed on appeal. A conduit constructed by the defendant in a natural wash carried water to a point over a mile above plaintiff's property and there returned said water to the wash which crossed plaintiff's land. At page 406, the court said: 'It is apparently contended on behalf of the plaintiff that even if the injury be *damnum absque injuria* as between private parties, yet when the injury is inflicted by an improvement made by public authority, it must be compensated for under the provision of our constitution (Art. I, § 14) that private property shall not be taken or damaged for a public use without just compensation. But the contrary has been directly decided since the filing of the original briefs in this case in Gray v. Reclamation District, 174 Cal. 622 [163 P. [1021] 1041]."

The San Gabriel case, *supra*, Gray v. Reclamation District, cited therein *supra*, Archer v. City of Los Angeles, 9 Cal. 2d 19, [119 P. 2d 1], and Bauer v. County of Ventura, 45 Cal. 2d 276 [289 P. 2d 1], cited in appellant's opening brief, concern temporary flooding, or probable flooding, of lower lands riparian to a stream in which changes were made or planned by defendants for the purpose of flood prevention. They involve no taking or damaging of private property as part of the actual construction of public works. Not one of said above cited cases lends credence to appellant's claim that the Flood Control District has a "natural easement" along every natural drainway or ditch, which may be deepened, widened, ce-

mented, covered, opened or changed at will, regardless of and without payment for damage to or destruction of any prior improvements over, across or near said drainway or ditch.

In the instant action, plaintiffs' 30-inch high pressure gas pipe had been installed in their own private easement below the bed of the natural drainway. Appellant District, for the improvement of said drainway, required plaintiffs to, and they did, permit defendant to build a cement conduit across the easement of respondent Gas Companies, wider and deeper than said drainway had been. In connection with the construction of said conduit, said gas pipe was necessarily removed from its then position beneath the bed of said drainway and reconstructed across the top of said cement conduit and beneath the surface of the ground. Said relocation was done pursuant to defendant's demands in connection with its construction of said "East Whittier Storm Drain Project No. 29."

In the Bauer case, *supra*, where plaintiff sought to recover damages to her riparian property caused by defendant's changing of the height of its ditch on property above that of plaintiff, judgment of dismissal was reversed with directions. At page 282, the court said: "California Constitution, article I, section 14, provides: 'Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court, for, the owner . . .

"The taking of private property by the state for a public use is universally recognized as one of the indisputable attributes of sovereignty . . . But the state must, except under special circumstances not here present, follow the constitutional procedure which requires the payment of compensation before the private owner is dis-

possessed of his property. When this requirement is not fully satisfied, an action will lie against the state to recover the value of the property so taken . . . .

"Section 14, however, is designed not to create new causes of action but only to give the private property owner a remedy he would not otherwise have against the state for the unlawful dispossession, destruction or damage of his property. The state is therefore not liable under this provision for property damage that is *damnum absque injuria*. If the property owner would have no cause of action against a private citizen on the same facts, he can have no claim for compensation against the state under section 14 . .

". . . . Hence it is clear that the ordinary taking of private property for the purpose of constructing storm drainage systems is a taking for a public use. The reasons for such a taking are obviously to provide adequate normal drainage, to control flood waters and to provide irrigation waters. The public becomes principally entitled to the use and enjoyment of the private property taken for such purposes." (P. 284.)

". . . It follows that the taking or damaging of private property for the maintenance of an existing public improvement involving a deliberate act which has as its object the direct or indirect accomplishment of the purpose of the improvement as a whole constitutes a taking or damaging of property for a public use and the owner of such property is entitled to compensation.

". . . Had the bank been raised during the original construction it would have been part of the over-all project and hence within the rule of Clement v. State Reclamation Board, *supra*, 35 Cal. 2d 628, and House v. Los Angeles County Flood Control Dist., *supra*, 25 Cal. 2d 384 . . ." (P. 285.)

The House and Clement cases, cited in the portion of the Bauer decision last above quoted, are both based upon the premise that "The construction of the public improvement is a deliberate action of the state or its agency in furtherance of public purposes. If private property is damaged thereby the state or its agency must compensate the owner therefor . . ." (Clement v. State Reclamation Board, 35 Cal. 2d 628, 641 [220 P. 2d 897].)

We are satisfied that there is no "natural easement" across private property along a ditch or drainway in favor of a Flood Control District or other governmental agency for the purpose of constructing public works.

The Gas Companies having been required by appellant District to move and reconstruct their pipeline in and along their own private easement across said drainway, appellant District and not the Gas Companies should pay the cost of such removal. Appellant District, under the act by which it was created, has the power to require obedience to its demands in its exercise of its right of eminent domain. That power, however, does not relieve said District of its obligation to pay for all property taken or damages caused by its construction of public works.

None of the facts appearing in the record in the instant action require or warrant any exercise by the District of the police power of the state.

Having determined that appellant was not the owner of its claimed "natural easement," the rights claimed by it as incidental to such "natural easement" become immaterial.

The judgment is affirmed.

FOURT, *J.*, and LILLIE, *J.*, concurred.